

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

SEP 25 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

RICHARD L. ANDERSON,

Appellant.

2 CA-CR 2006-0256

DEPARTMENT A

MEMORANDUM DECISION

Not for Publication

Rule 111, Rules of
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200400414

Honorable Thomas E. Collins, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General

By Randall M. Howe and Kathryn A. Damstra

Tucson
Attorneys for Appellee

Mark A. Suagee, Cochise County Public Defender

By Kelly A.K. Smith

Bisbee
Attorneys for Appellant

B R A M M E R, Judge.

¶1 Appellant Richard Anderson appeals from the trial court's denial of his motion to dismiss the state's petition to revoke his probation. He asserts the delay between his arraignment on the petition and the violation hearing exceeded the twenty-day time limit of

Rule 27.8, Ariz. R. Crim. P., and, thus, the court was required to dismiss the petition. Finding no error, we affirm.

Factual and Procedural Background

¶2 In November 2004, Anderson pled guilty to three counts of attempted sexual exploitation of a minor. The trial court suspended imposition of sentence and placed him on lifetime supervised probation. On June 15, 2005, the state filed a petition to revoke probation, alleging Anderson had violated its terms by “establish[ing] and maintain[ing] contact with a person under the age of 18 without written permission of his probation officer.” Anderson was arraigned on June 12, 2005,¹ and a revocation review hearing was scheduled for June 27. At that hearing, Anderson asked the court to set a violation hearing within the time limits set forth in Rule 27.8. The court set the violation hearing for July 10.

¶3 On June 28, Anderson filed a “notice of impending expiration of time limits,” asserting that, under Rule 27.8, the probation violation hearing had to occur by July 3. The state filed a “motion contradicting [Anderson’s] calculation of time limits,” claiming that some of the time between Anderson’s arraignment and the scheduled violation hearing should be excluded from the time limits of Rule 27.8, consequently making the July 10 hearing timely. The trial court did not rule on this issue until the July 10 violation hearing, when Anderson moved to dismiss the petition to revoke, arguing the Rule 27.8 time limits

¹The petition to revoke probation was dated June 11 but apparently not filed until June 15.

had been violated. The court agreed the time limits had been violated but determined Anderson was not prejudiced by the delay and denied his motion to dismiss.

¶4 After the probation violation hearing, the trial court found, by a preponderance of the evidence, that Anderson had violated the terms and conditions of his probation. At the disposition hearing, the court placed Anderson on lifetime intensive probation. This appeal followed.

Discussion

¶5 Anderson contends the trial court erred by denying his motion to dismiss the petition for revocation because the time limits set forth in Rule 27.8(b)(1) had been violated. The rule provides that a violation hearing must be held “no less than 7 and no more than 20 days after the revocation arraignment.” Ariz. R. Crim. P. 27.8(b)(1).

¶6 We review for an abuse of discretion a trial court’s denial of a motion to dismiss a petition to revoke probation. *See State v. Chavez*, 208 Ariz. 606, ¶ 2, 96 P.3d 1093, 1094 (App. 2004); *see also State v. Belcher*, 111 Ariz. 580, 581, 535 P.2d 1297, 1298 (1975) (no abuse of trial court’s discretion in failing to dismiss probation revocation petition after untimely preliminary hearing). Committing legal error is an abuse of discretion. *See Tritschler v. Allstate Ins. Co.*, 213 Ariz. 505, ¶ 41, 144 P.3d 519, 532 (App. 2006) (“A court abuses its discretion if it commits legal error in reaching a discretionary conclusion, or if the record lacks substantial evidence to support its ruling.”). To the extent the court’s determination depends on the interpretation of statutes and rules, we review its conclusions

de novo. *State v. Hansen*, 215 Ariz. 287, ¶ 6, 160 P.3d 166, 168 (2007) (“Interpreting rules, statutes, and constitutional provisions raises questions of law, which we review de novo.”).

¶7 Anderson admits Rule 27.8 provides no specific remedy if its time limits are exceeded. He argues, however, that, because “the rules of criminal procedure are for protection in every criminal proceeding,” and because Rule 27.8 is essentially a speedy trial requirement analogous to Rule 8, Ariz. R. Crim. P., Rule 8.6 required the trial court to dismiss the petition to revoke his probation. (Emphasis removed.) Rule 8.6 provides:

If the court determines after considering the exclusions of Rule 8.4, that a time limit established by Rules 8.2(a), 8.2(b), 8.2(c), 8.2(d), 8.3(a), 8.3(b)(2), or 8.3(b)(3) has been violated, it shall on motion of the defendant, or on its own initiative, dismiss the prosecution with or without prejudice.

¶8 First, Anderson’s position is inconsistent with the rules of statutory construction. “In construing procedural rules promulgated by our supreme court, we employ the traditional tools of statutory construction.” *Medders v. Conlogue*, 208 Ariz. 75, ¶ 9, 90 P.3d 1241, 1244 (App. 2004). We look first to the plain language of the rule. *In re MH 2004-001987*, 211 Ariz. 255, ¶ 15, 120 P.3d 210, 213 (App. 2005). As Anderson admits, the plain language of Rule 8.6 includes only the provisions of Rule 8 and contains no reference to Rule 27.8. The *expressio unius est exclusio alterius* principle informs us that, in construing a statute, “the expression of one thing is the exclusion of another.” *State v. Gonzales*, 206 Ariz. 429, ¶ 11, 80 P.3d 276, 278 (App. 2003). Had our supreme court intended for Rule 8.6 to apply to a violation of the time limits of Rule 27.8, it would have done so explicitly.

¶9 Moreover, it is settled law in Arizona that the time limits of Rule 27.8 are not jurisdictional. *State v. Flemming*, 184 Ariz. 110, 115, 907 P.2d 496, 501 (1995). And, “[i]f a person is denied a timely hearing, . . . prejudice resulting from the delay must still be shown to set aside the probation revocation.” *State v. Adler*, 189 Ariz. 280, 284, 942 P.2d 439, 443 (1997); *see also Belcher*, 111 Ariz. at 581, 525 P.2d at 1298. Anderson does not suggest the minimal delay here prejudiced him, contending instead that prejudice is only relevant to whether a dismissal should be with or without prejudice. Anderson attempts to distinguish *Alder* and *Flemming*, stating that neither case “raise[s] or address[es] the matter of Rule 8.6.” As we have explained, however, Rule 8.6 by its plain language does not apply to Rule 27.8. Thus, there would have been no reason for our supreme court to discuss such a relationship in either *Flemming* or *Alder*.

¶10 Anderson nonetheless contends we should “construe[]” Rule 8.6 to apply to Rule 27.8, or “at the very least” be guided by Rule 8.6 “as to the proper remedy for a violation of [Rule 27.8] time limits.” He argues that, because “any delay [of a probation violation hearing] occasioned by the defendant would be excluded pursuant to Rule 8.4, [Ariz. R. Crim. P.],”² we should also apply the mandatory dismissal provision of Rule 8.6.

¶11 Anderson cites no authority, however, and we find none, suggesting Rule 8.4 applies to delays of probation violation hearings caused by defendants.³ He relies on *State*

²Rule 8.4 enumerates certain types of delays that are excluded from the speedy trial requirement, including “[d]elays occasioned by or on behalf of the defendant.”

³It is clear, however, that delays attributable to a defendant that cause a violation of the time limits of Rule 27.8 do not violate due process. *See State v. Flemming*, 184 Ariz.

v. Reidhead, 152 Ariz. 231, 731 P.2d 126 (1986), *overruled on other grounds by State v. Georgeoff*, 163 Ariz. 434, 78 P.2d 1185 (1990). In *Reidhead*, Division One of this court stated: “The Arizona Rules of Criminal Procedure are intended to provide for the just, speedy determination of every criminal proceeding and are to be construed so as to secure simplicity in procedure, fairness in administration, elimination of delay, and the protection of fundamental rights.” 152 Ariz. at 233, 731 P.2d at 128. Thus, Anderson reasons, “the rules of criminal procedure are for protection in every criminal proceeding,” and the provisions of Rules 8.4 and 8.6 should apply to the time limits of Rule 27.8. (Emphasis removed).

¶12 *Reidhead*, however, does not support Anderson’s position. Indeed, it suggests the opposite. The court determined that, although the rules governing probation violations did not explicitly provide “a procedure for probation violation agreements between a defendant and the state,” nothing in Arizona’s rules prohibited such agreements. *Reidhead*, 152 Ariz. at 233, 731 P.2d at 128. In support of this conclusion, the court noted that Rule 17.4, Ariz. R. Crim. P., permitted the parties to “reach an agreement on[] *any* aspect of the disposition of the case.” *Reidhead*, 152 Ariz. at 233, 731 P.2d at 128. Division One, however, explicitly declined to apply “the strict requirements of Rule 17 in accepting guilty pleas” to probation violation agreements. *Id.* at 234, 731 P.2d at 129. Instead, the court determined “[a] petitioner alleged to have violated probation is entitled to the minimum due

110, 115, 907 P.2d 496, 501 (1995) (“When the defendant requests a brief delay, his due process rights to a timely hearing are not violated.”).

process rights guaranteed by the Fourteenth Amendment and by the Arizona Constitution.” *Id.* (citations omitted). Accordingly, *Reidhead* does not suggest we must apply either Rule 8.4 or Rule 8.6 to Rule 27.8 merely because both Rules 8 and 27.8 address scheduling issues. Instead, consistent with *Adler*, *Reidhead* suggests only that any delay must not violate a defendant’s due process rights.

¶13 Finally, Anderson contends that, unless Rule 8.6 applies to violations of the time limits in Rule 27.8, a defendant is left without a remedy and the time limits will “mean nothing and . . . will be consistently violated.” This argument, however, is without merit; a defendant has a remedy for meaningful violations of Rule 27.8. In the event a defendant demonstrates prejudice, the trial court may dismiss the probation revocation petition. *See Flemming*, 184 Ariz. at 117, 907 P.2d at 503 (instructing trial court “to dismiss with prejudice the petition to revoke probation” following “extreme, unexplained delay” in conducting violation hearing).

¶14 We affirm.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

PHILIP G. ESPINOSA, Judge